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No. 92-2048

IN THE
# Supreme Court of the United States
October Term 1992

PAT S. HOLLOWAY, ROBBIE HOLLOWAY, AND FLOJO TRADING CORPORATION,
*Petitioners*,
v.
JANE H. BROWNING, MICHAEL G. STARNES, ET AL.,
*Respondents*.

**On Petition For Writ Of Certiorari To the Court of Appeals For the Fifth Judicial District of Texas at Dallas**

## REPLY OF PAT S. HOLLOWAY AND ROBBIE HOLLOWAY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . . . ii

REPLY . . . . . 2

PETITIONERS PROPERLY PRESERVED THE FEDERAL ISSUES . . . . . 2

A. The Constitutional Issues of Judge Walker's Disqualification. . . . . 2

B. The Federal Res Judicata Issues. . . . . 4

CONCLUSION . . . . . 7

## TABLE OF AUTHORITIES

**Cases** **Page**

*Bender v. Damon*,
72 Tex. 93, 9 S.W. 747 (1888) . . . . . 4

*Browning v. Placke*,
698 S.W. 2d 362 (Tex. 1985) . . . . . 4

*Bucholtz Ind. Sch. Dist. v. Glazer*,
362 S.W. 2d 146 (Tex. 1982) . . . . . 4

*Chambers v. Hodges*,
23 Tex. 105 (1859) . . . . . 4

*Delaware Citizens' Council v. Commonwealth of Pennsylvania*,
755 F. 2d 38 (3rd Cir. 1985), *cert. denied*, 474 U.S. 819 (1985) . . . . . 5

*Fulton v. Finch*,
162 Tex. 351, 346 S.W. 2d 823 (1961) . . . . . 4

*Mapco Inc. v. Carter*,
817 S.W. 2d 362 (Tex. 1991) . . . . . 4

*Newcome v. Light*,
58 Tex 141 (1882) . . . . . 4

*Nilsen v. City of Moss Point*, Mississippi,
701 F. 2d 556 (5th Cir. 1983) (*en banc*) . . . . . 5

*Woodland v. State*,
178 S.W. 2d 528 (Tex. Crim. App. 1944) . . . . 3

**Treatises**

**Page**

Moore's Federal Practice § 0.409 [1. -2],
p. 311 (1992) . . . . . 5

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Pursuant to Rule 15.6, Petitioners Pat S. Holloway ("Holloway") and Robbie Holloway ("Robbie") respectfully make this reply to the new arguments first raised in Respondents' Brief In Opposition in this cause to the Petition for Writ of Certiorari.

Respondents' brief does not cite or refer to *any* decision of this Court. Respondents' brief does not deny, or even address, any of the substantive facts presented in the Holloways' petition or in the petition of Flojo Trading Corporation in the companion Case No. 92-2049. Instead, Respondents misrepresent the record, the Texas law, and the

Holloway's position in order to argue both that they have not preserved their federal claims, and that no federal question is really involved.

## REPLY

## PETITIONERS PROPERLY PRESERVED THE FEDERAL ISSUES

A. *The Constitutional Issues of Judge Walker's Disqualification.*

Respondents wrongly claim (p. 15) that the Holloways have failed to preserve these issues. But they admit that Holloway's first motion for summary judgment asserted that Judge Walker's financial interest and bias violated the Due Process Clause of the Texas Constitution, and that his sixth motion for summary judgment asserted a violation of the Due Process Clause of the 14th Amendment. *P.15.*

Respondents point out that in Holloway's second amended petition he alleged only a "deprivation of due process under the Texas Constitution." That was because his (but not Robbie's) federal due process claim by then had been dismissed *with* prejudice in *Holloway v. Walker*, wherein his state claims were dismissed *without* prejudice.

Contrary to Respondents' argument, the record itself shows that Robbie adopted and urged these disqualification motions. She moved to strike portions of Judge Walker's affidavit filed by the Brownings in opposition to the first motion. *Tr. 693.* There she referred to Holloway's first motion, not as a motion by co-plaintiff Pat S. Holloway, but as "*Plaintiffs*' (First) Motion for Summary Judgment." *Tr. 693.* (emphasis added).

Robbie's First Amended Original Petition, never amended, superseded or abandoned, explicitly asserts that the Walker Judgment is void because Judge Walker's disqualification under "the Due Process Clause of the Texas Constitution and the United States Constitution." She further specifically alleged that Judge Walker was " 'interested in the outcome of the case' within the meaning of the Texas Constitution and the United Sates Constitution because of . . . "

Furthermore, Respondents fail to advise this Court that under Texas law and procedure it is actually immaterial that Robbie both pled the 14th Amendment and adopted and urged the disqualification motions for summary judgment in the district court in the present case. Even if she had not done so, she would have been entitled to assert the constitutional disqualification issue at any subsequent point in this litigation, because under Texas law such issues *cannot be waived*. A classical statement of the applicable Texas rule is contained in *Woodland v. State*, 178 S.W. 2d 528, 529-530 (Tex. Crim. App. 1944):

> Where a disqualification arises from a constitutional or statutory provision it cannot be waived even by consent of the parties litigant. *** The entire proceedings in No. 7144 were nullity and the judgment void and subject to collateral attack. *** The fact that appellant did not raise the question in the latter case, entered his plea of guilty and satisfied the judgment, and did not raise the question in the present case until presented in the motion for new trial did not preclude him from then raising it. To hold otherwise would in effect be to hold that he could waive the constitutional and statutory disqualification of the judge, which he can not do.

The Supreme Court of Texas recently has held again that "lack of jurisdiction is fundamental error and may be raised for the first time before this Court." *Mapco Inc. v. Carter*, 817 S.W. 2d 362, 363 (Tex. 1991). That court always has treated disqualification of the judge as one of the "jurisdictional deficiencies" that render a judgment void and subject to collateral attack. *E.g.*, *Browning v. Placke*, 698 S.W. 2d 362, 363 (Tex. 1985) ("no capacity to act as a court"); *Newcome v. Light*, 58 Tex 141 (1882); *Chambers v. Hodges*, 23 Tex. 105, 113 (1859).

A void judgment "may be disregarded anywhere at any time", *Fulton v. Finch*, 162 Tex. 351, 346 S.W. 2d 823, 827 (1961), "in any court." *Bender v. Damon*, 72 Tex. 93, 9 S.W. 747, 748 (1888). "Accordingly, disregard of the constitutional disqualification is error that can be raised at any point in the proceeding." *Bucholtz Ind. Sch. Dist. v. Glazer*, 362 S.W. 2d 146, 149 (Tex. 1982). Respondents' argument that Petitioner have waived and failed to preserve their disqualification issues is without merit, both factually and legally.

B. *The Federal Res Judicata Issues.*

Respondents wrongly assert (*p. 17*) that Petitioners have not preserved their issues 2 and 3 based on the federal law of res judicata, which both the Dallas Court of Appeals and Respondents have conceded is controlling. Petitioners have pled and argued in their briefs at every turn of the proceedings that the "federal law of res judicata" requires the state courts to honor the federal judgments which dismissed *without* prejudice all of Holloway's state claims and which "ABSTAIN(ED) in favor of the Courts of the State of Texas" from adjudicating any of the federal and state claims presented by Robbie Holloway in the present case.

The fact that Petitioners have not referred explicitly at every turn to the Supremacy Clause itself as the foundation of the "federal law of res judicata" cannot properly be construed to waive Petitioners' federal rights when this Court itself, while consistently requiring state courts to honor federal judgments, generally does not refer explicitly to the Supremacy Clause in its res judicata decisions (*see* cases cited on pp. 19, 20 and 24, and commentators cited in n. 6 on p. 18, of the Petition), and when only one concurring judge of the Third Circuit has found it appropriate to point out that the "ultimate source for binding state courts to federal decrees is the Supremacy Clause." *Delaware Citizens' Council v. Commonwealth of Pennsylvania*, 755 F. 2d 38, 46 (3rd Cir. 1985), *cert. denied*, 474 U.S. 819 (1985). *See Moore's Federal Practice* § 0.409 [1. -2], p. 311 (1992).

In the present case the Dallas Court of Appeals repeatedly cites, and treats as authoritative and controlling on the federal law of res judicata, the leading Fifth Circuit decision of *Nilsen v. City of Moss Point, Mississippi*, 701 F. 2d 556 (5th Cir. 1983) (*en banc*). But all the courts below studiously have ignored what *Nilsen* very plainly ruled about the precise fact situation presented in this litigation:

> The panel concluded that [] the rule against splitting causes of action..."has no function if the procedural system does not permit the litigant to raise all of those claims in one proceeding." (citations omitted). This is sound law...Its soundness is borne out of the illustration given by the panel, that of the refusal of a federal court, in the exercise of its discretion, to exercise jurisdiction over pendent state claims. Doubtless such claims...should be held not precluded. *Id*. This is so

> because, under the procedural system of the forum, the magistrate either could not or need not have entertained them. *Restatement (Second) of Judgments* §25, *Comment E.* Put another way, the rule against splitting causes has no function when the court itself, rather than the litigant, does the splitting..."

*Nilsen, supra*, at 562-3. That is the applicable controlling, and recurringly important, principle of the federal law of res judicata which all the state courts have ignored. This is the federal rule which Petitioners seek to have this Court uphold, while re-affirming that federal due process requires an unbiased and financially disinterested judge.

## CONCLUSION

To maintain the fabric of an ordered society, it is essential that its judges, both trial and appellate, not only be financially disinterested, unbiased, fair and honest, but that the public perceive them to be so. It is surely fair to say that the present notorious litigation has done at least as mich as, if not more than, any other in the last decade to stain and unravel our fraying fabric, and lessen the public respect for our entire judicial system. The Court should grant the Petition and summarily reverse the courts below.

Respectfully submitted,

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